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No. 92-551

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

JACK F. KEMP, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *et al.*,
Petitioners,
v.
ALPINE RIDGE GROUP, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") moves for leave to file the attached brief *amicus curiae* in support of petitioners. Petitioners have granted their consent to the filing of said brief. Respondents have refused their consent. In support of this motion, the AFL-CIO states as follows:

1. The AFL-CIO is a federation of 89 national and international unions with a total membership of approximately 14,000,000 working men and women.

2. The AFL-CIO, its affiliates, and their members have a strong interest in the standards governing Due Process Clause and Contract challenges to regulatory legislation. *See, e.g., General Motors Corp. v. Romein*, 112 S.Ct. 1105 (1992) (ruling on employer challenge to a curative legislative modification to a state workers compensation law based on the legislation's alleged impairment of employer-employee contracts).

3. The attached brief *amicus curiae* sets forth the constitutional analysis that, in the view of the AFL-CIO, should apply in this case if this Court were to conclude that *Ranier View Associates v. United States Dep't of HUD*, 848 F.2d 988 (9th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989), properly interprets the contracts at issue here. That analysis emphasizes the distinction between legislation that affects purely private contracts and legislation that affects contracts between the Government and a private party, a distinction not emphasized in the jurisdictional papers.

CONCLUSION

For the above stated reasons, this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The interest of the American Federation of Labor and Congress of Industrial Organizations in this case is set forth in the foregoing motion for leave to file this brief.

SUMMARY OF ARGUMENT

1. It is our position that the Government's interpretation of the housing assistance payment contracts ("HAP contracts") at issue in this case is the proper interpretation, and we submit that the Court should embrace that interpretation and decide the due process

issue presented here on that basis. We leave it to the Government to demonstrate as much. In this brief, we urge that even if this Court were to agree with the Ninth Circuit's interupretation of the HAP contracts in *Ranier View Associates v. United States Dep't of HUD*, 848 F.2d 988 (9th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989), the statutory provision enacted in response to that decision—and to other problems in the administration of the Government's housing program—challenged here as impairing respondents' rights under their HAP contracts, would not violate the Due Process Clause.

2. As the HAP contracts make explicit, respondents—owners of federally-assisted housing units—have *not* had, and do *not* have, a contract right to rental increases that result in the owner realizing rents that exceed by a material amount the rents charged for comparable unassisted units. The *Ranier View* interpretation of those contracts is not to the contrary. *Ranier View*'s conclusion is *not* that the HAP contracts provide for no overall limitation that confines the owner to a rent not materially in excess of the rent at comparable unassisted projects, but that there *is* such a limitation and that the Department of Housing and Urban Development ("HUD") adopted an erroneous approach to implementing that limitation. By holding HUD to that administrative error, the *Ranier View* remedy created a windfall to those project owners who would receive, as a result of that remedy, rents materially in excess of rents for "comparable unassisted units."

The HAP contracts created no reasonable expectation that the project owners would receive such a windfall. The express office of the "overall limitation" provision is to preclude any such expectation. And, it could not reasonably have been contemplated that a court would remedy an error in HUD's implementation of that provision by leaving the provision unenforceable.

At bottom, then, what respondents seek here is not constitutional protection for their reasonable contract-based expectations. Rather, respondents seek for themselves the same windfall that the *Ranier View* decision created for the project owners in that case. For, it is only that windfall—not any monetary return contemplated by the HAP contracts—that is put at risk by the statutory provision challenged here.

3. Were all the parties to the contracts in question private parties, respondents' due process claim would be frivolous under this Court's long-settled jurisprudence. *See, e.g., Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984). But we recognize that the fact that the Government is a party to the contracts here gives this case an added dimension.

At the core of the concept of contract is the principle that a party cannot unilaterally diminish its contractual obligations. At the core of our concept of constitutional government is the principle that the Government must be able to govern. This Court has addressed the tension created by the coexistence of these two principles in the context of both the Contract Clause—where a contract to which a State is party is involved—and the Due Process Clause—where a contract to which the Federal Government is party is involved. In both contexts, this Court has stated that there is no absolute bar to subsequent legislative modification of a government's contractual obligations. And, in both contexts, this Court has recognized the limiting principle that a government contract cannot constitute a surrender of an essential attribute of the government's sovereignty.

4. While this Court has not fully developed the Due Process Clause standard that governs when Congress acts in a way that diminishes a contractual obligation of the Federal Government, it is at least clear from the case law that the Due Process Clause does not impose greater restrictions on the Federal Government than the Contract

Clause imposes on the States. And that is enough clarity for the decision of this case. For the statutory provision here would pass muster under the Contract Clause standard, and therefore, most assuredly passes muster under the Due Process Clause.

Respondents cannot meet the threshold requirement of showing that a reasonable contract-based expectation has been impaired. As *El Paso v. Simmons*, 379 U.S. 497, 515 (1965), states:

> Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to atack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract.

Under that standard, the enactment challenged in this case is entirely consistent with the Constitution.

Moreover, the legislative purposes here are qualitatively different from those that this Court has found inadequate to justify a government's annulment of its own contractual obligations in previous cases. To the extent that Congress sought to save the Government money, it was money that constituted a windfall to project owners over and above what the owners could reasonably expect from their HAP contracts, and there was no annulment of the owner's reasonable expectations to contract payments. Moreover, the Legislature's purposes went beyond the saving of government funds. The situation here was one in which the pendency of a legal dispute over proper interpretation of a standard-form contract to which the Government is a party was interfering with the effectiveness of a government program designed to further important public interests. The Due Process Clause does not disable Congress from enacting a correction to such a situation, even where that correction may alter what the judicial system ultimately might have found to have been the Government's original contractual obligation.

ARGUMENT

1. *The Background.* The threshold question in resolving the constitutional issue presented here is the meaning of sections 1.9b and 1.9d of the housing assistance payment contracts ("HAP contracts") between the Department of Housing and Urban Development ("HUD") and respondents, owners of so-called "Section 8" rental housing projects.[1]

Section 1.9b of those contracts provides in pertinent part:

> (1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register . . . .
>
> (2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government.[2]

Section 1.9d adds:

> d. *Overall Limitation.* Notwithstanding any other provisions of this Contract, adjustments as provided

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[1] Section 8 of the Housing Act of 1937, as amended, 42 U.S.C. § 1437f ("Housing Act"), establishes a program which provides federally subsidized housing to millions of low-income tenants by authorizing government payment of rent subsidies. The United States, through HUD, enters into standard form long-term contracts with project developers and landlords. A project tenant's rental obligation is a function of his or her ability to pay, and the Federal Government makes payments to the project owner to bring total rental income up to the "fair market rental." *See* 42 U.S.C. §§ 1437a(a), 1437f(b) and (c).

[2] The relevant sections of the HAP contracts are quoted in *Ranier View Associates v. United States Dep't of HUD*, 848 F.2d 988, 989-90 (9th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989). Section 8(c)(2)(A) of the Housing Act requires that HAP contracts provide for an annual adjustment in maximum monthly rents for covered units.

> in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government; provided that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents.[3]

Prior to the enactment of the statute here at issue, the "adjustment factors" used by HUD were derived from general indices of inflation—the Consumer Price Index and the Bureau of the Census Housing Surveys—and were applied across broad regions of the country. *See, e.g.*, 52 Fed. Reg. 9478-9491 (1987) (establishing separate adjustment factors for four census regions, for Alaska and Hawaii, and for seventy-two metropolitan areas). These adjustment factors did not purport to be predicated upon—or even to reflect—data as to the market rents for "comparable unassisted units" in any particular housing market. Rather, HUD attempted to implement the "overall limitation" on Section 8 rental payments stated in section 1.9d of the HAP contracts through a two step process. In addition to deriving the adjustment factors in the manner just noted, HUD undertook to make targeted comparability studies with respect to certain individual Section 8 housing projects. Where these studies showed that the rents that would obtain for an assisted project by virtue of application of the adjustment factors would be materially higher than the rents for comparable unassisted projects in the relevant market, HUD sought to limit the amount of the rent for the assisted projects to a level that would not result in such a material difference.[4]

---

[3] Section 8(c)(2)(C) of the Housing Act requires that this provision appear in every HAP contract.

[4] As the proviso to section 1.9d of HAP contracts states, these determinations did not include in the calculation of rental differences those "differences exist[ing] with respect to the contract rents set at Contract execution or cost certification." *See also* 24 C.F.R. § 880.609(c).

The Ninth Circuit in *Ranier View Associates v. United States Dep't of HUD*, *supra*, interpreted the HAP contracts to bar HUD's method of implementing section 1.9d's "overall limitation." According to *Ranier View*, under the HAP contracts, the only permissible way for HUD to implement section 1.9d's requirement that there be no material "differences betwen the rents charged for assisted and comparable unassisted units" was to modify the Agency's adjustment factors formula so that the formula itself—and not a second step comparability study—incorporated sufficient comparability data to preclude material differences between the rents for any assisted project and comparable unassisted units.

As we discuss below, the *Ranier View* decision was one of the events that precipitated the passage of the statutory provision under challenge here: section 801 of the HUD Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 2057 ("the 1989 Act"). That provision is challenged on the ground that it deprives respondents of rights established by the HAP contracts in violation of the Due Process Clause of the Fifth Amendment. That challenge rests, in the first instance, on the correctness of the *Ranier View* interpretation of the HAP contracts. If, as the Government contends, that interpretation is wrong and HUD's method of implementing section 1.9d was consistent with the contracts, the Due Process claim of respondents must fail. Thus, if the Government's interpretation prevails, Congress' resolution of this matter in section 801 of the 1989 Act—which as discussed, *infra* pp. 10-11, gives to respondents and similarly situated project owners *more* than they would have been entitled to under the Government's interpretation of the contracts—could not be said to impair any of respondents' contractual rights.

We believe that the Government's interpretation of the HAP contracts is the proper interpretation and submit that the Court should embrace that interpretation and

that this case should be decided on that ground. We leave it to the Government to demonstrate as much, and in the balance of this brief we urge that even if this Court were to agree with the *Ranier View* interpretation of the HAP contracts, section 801 would not violate respondents' rights under the Due Process Clause. Accordingly, we henceforth assume, for purposes of analysis, that *Ranier View* properly interprets the HAP contracts.

2. *Section 801's Impact on the HAP Contracts.* The starting point for analysis of the due process question as we have just stated it is to identify what, if any, of respondents' contractual rights are impaired by section 801 of the 1989 Act. We initiate this inquiry by examining the statutory provision challenged here and then assess the impact of that provision upon the contractual rights of respondents.

a. Section 801 was enacted as one provision of a major piece of legislation effecting a wide range of reforms at HUD in the wake of highly publicized evidence of corruption in, and mismanagement of, the Department.

The Senate Banking, Housing and Urban Affairs Committee stated that section 801 "seeks a fair, nationwide settlement of the harm caused by the Reagan Administration's maladministration of the Section 8 . . . program." 135 Cong. Rec. S16,600 (daily ed. Nov. 21, 1989) (Section-by-section analysis of the bill prepared by the Senate Banking, Housing and Urban Affairs Committee, placed in the record by Senator Cranston). In particular, the legislative history of section 801 indicates that the provision was the product of three distinct congressional concerns.

First, the Senate Committee statement expressed a concern that the comparability studies conducted by HUD "suffered from serious procedural deficiences," *id.*:

> Field offices were able to devise their own rules for comparability studies since no uniform guidelines (published or otherwise) existed. Owners in different part of the country were, therefore subjected to differing procedures without any justifying rationale. [*Id.*; *see also id.* at S16,594 (statement of Sen. Cranston, the bill's chief sponsor in the Senate).]

Second, the Committee stated that it "did not . . . share the Ninth Circuit's interpretation of HUD's authority to perform individualized comparability studies." *Id.* at S16,600. The Committee believed that "a market reality test must be an integral component of the Section 8 program to ensure that HUD pays reasonable rents." *Id.* In this connection, the Committee expressed a particular concern that "[t]he court's award of damages—retroactive payments based on the [adjustment factors] applied to the full contract rents—would have HUD paying rents that in some areas are significantly above the local rent levels." *Id.* As Senator D'Amato, a co-sponsor of the bill, stated, payments computed in this way, with no mechanism for reflecting the market comparability requirements stated in the HAP contracts, would constitute "windfall payments" to developers and owners of Section 8 projects. *Id.* at S16,601-02.

Third, the legislative materials indicate a congressional concern that the combined result of the maladministration of the comparability studies and the *Ranier View* decision—a decision of a single circuit—was to leave the operation of the Section 8 program in a state of confusion and instability. In Senator D'Amato's words, section 801 was designed to "eliminate uncertainty and contribute to smooth and effective operation of the section 8 program." *Id.* at S16,602; *see also id.* at S16,600-01 (statement of Senate Committee); S16,594 (statement of Sen. Cranston).

The statutory provision adopted by Congress is well tailored to meet these concerns without depriving owners and developers of their legitimate contractual interest in adjustments over time that maintain rents for assisted units at a level not materially different from rents for

"comparable unassisted units." The approach of section 801 is to deal separately with the past—the period from fiscal year 1980 until regulations implementing section 801 take effect—and the future.

As to the past, section 801 does *not* seek to implement the Government's interpretation of section 1.9d of the HAP contracts that was rejected in *Rainier View*. Rather, Congress adopted a middle ground. In cases where rents were reduced or where rental increases were limited as a result of comparability studies—and in cases where owners did not request a rental increase because of "anticipated negative adjustment(s)" due to comparability studies—section 801 provides retroactive monetary relief to the project owners.[5] The amount of that relief is predicated on a modified form of the relief awarded in *Ranier View*: for each year in the period covered, owners are, in effect, entitled to receive retroactive rental increases equal to the product of the applicable published adjustment factor for that year multiplied by the "contract rent minus the amount of the contract rent attributable to debt service." *See* section 801(a)(1)(B).

Thus, Congress permitted the project owners to receive retroactive rental increases that are based on general inflation indices and are not limited by specific market comparability data, with one qualification. Owners are not to receive the benefit of inflation increases calculated on the basis of certain *fixed* costs—debt service costs—that are by definition *not* affected by inflation. And, that qualification is tempered by an added protection to the owners: section 801 provides that "in no event shall any project owner be paid an amount less than 30 percent of a figure equal to the aggregate of the annual adjustment

[5] Section 801(a) does *not* apply to housing projects covered by a prior final judgment in litigation over the authority of the HUD Secretary to use comparability studies to limit rent adjustments. *See* § 801(a)(2)(B).

factor multiplied by the full contract rent for each year. . . ."

As to the future, section 801 provides a scheme for implementation of the "overall limitation" provision in HAP contracts—a provision required by statute to be included in such contracts (see *supra*, note 3)—that in significant part is predicated on the *Ranier View* analysis.

In essence, HUD is to promulgate regulations for conducting comparability studies—either at the request of a project owner or at the initiation of the Secretary—"by establishing, to the extent practicable, a modified annual adjustment factor for such market area, as the Secretary shall designate, that is geographically smaller than the applicable housing area used for the establishment of the annual adjustment factor" previously published by HUD. Section 801(c). Section 801 goes on to specify the types of comparability data that are to be used in determining this modified annual adjustment factor. Only where the Secretary determines that such a modified adjustment factor "cannot be established" or would "when applied to a particular project . . . result in material differences between the rents charged for assisted units and unassisted units of similar quality, type, and age in the same market area," may the Secretary "apply an alternative methodology for conducting comparability studies in order to establish rents that are not materially different from the rents charged for comparable unassisted units." *Id.*

b. Against that background, we turn to a consideration of how, if at all, section 801 affects the contractual rights of respondents.

As section 1.9d of the HAP contracts makes explicit, respondents have *not* had, and do *not* have, a contract right to rental increases that result in the owner realizing rents that exceed by a material amount the rents charged for "comparable unassisted units." *Ranier View*

is not to the contrary. That decision recognizes that the owner's right is a right to a rent comparable to the rent at such unassisted units. Indeed, *Ranier View* makes it clear that the HAP contracts provide HUD with the right—and, according to the Ninth Circuit, a particular means—to avoid the payment of any subsidy that results in excessive rents.

The rub is that the means to that end identified in *Ranier View*—modification of the adjustment factors formula "to keep assisted rents in line with market rents" (848 F.2d at 991)—was *not* the means adopted by HUD prior to the enactment of section 801. Rather, as we have discussed, the adjustment factors published by HUD reflected inflation data of a more general nature and those adjustment factors could and apparently did produce Section 8 rents materially higher than market rents at comparable unassisted units.

Consistent with its understanding of the HAP contracts, the court in *Ranier View* could, practicalities aside, have provided a remedy permitting HUD retroactively to modify the adjustment factors applicable in that case. Such a remedy might well have diminished the rent subsidies due to the project owners. But, even under the *Ranier View* analysis, that remedy would not have deprived those owners of rental increases to which the owners were entitled under their HAP contracts. For whatever reason, that was not the remedy adopted in *Ranier View*. Rather, the Government was ordered to pay subsidies to those project owners based on rent adjustments that were to be determined solely by reference to the previously published adjustment factors—adjustment factors which were not designed to achieve the contractual end of limiting rents to levels not materially different from rents for "comparable unassisted units" in particular housing markets.

Ranier View, then, may have properly restricted HUD to the *means* contemplated by the HAP contracts—a

proposition we assume for purposes of this analysis. But on any interpretation of those contracts, the *Ranier View* remedy frustrated achievement of the *end* specified by those contracts—the Government payment of rent subsidies within the agreed-upon "overall limitation" stated in section 1.9d.

Ranier View's conclusion is *not* that the HAP contracts provide for no overall limitation that confines the owner to a rent not materially in excess of the rent at comparable unassisted projects, but that there *is* such a limitation and that HUD adopted an erroneous approach to implementing that limitation. By holding HUD to that administrative error, the *Ranier View* remedy created a windfall to those project owners who would receive, as a result of that remedy, rents materially in excess of rents for "comparable unassisted units."

The HAP contracts—as the foregoing shows—created no reasonable expectation that Section 8 project owners would receive such a windfall. The express office of the "overall limitation" provision is to preclude any such expectation. And, it could not reasonably have been contemplated that a court would remedy an error in HUD's implementation of that provision by leaving the provision unenforceable.

c. At bottom, then, what respondents seek here is not constitutional protection for their reasonable contract-based expectations. Rather, respondents seek for themselves the same windfall that the remedy in *Ranier View* created for the project owners in that case. For, as we have noted, *supra* p. —, it is only that windfall—not any monetary return contemplated by the HAP contracts—that is put at risk by section 801.

It is true that in the retrospective portion of section 801 the line that is drawn between permissible and excessive rental increases is not necessarily congruent in all cases with the line that would be drawn by application of comparability data in the manner permitted by

Ranier View. But the former line appears to be a fair, as well as a practical, approximation of the latter line. Thus, section 801 provides for retroactive rental increases over and above what was shown to be—or what project owners feared would be shown to be—allowable rents as measured by HUD's comparability studies. As we have noted, *supra* p. 10, retrospectively, project owners are permitted to take advantage of HUD's published annual adjustment factors, in unmodified form, subject only to the limitation that such factors—which reflect overall inflation during a specified period—shall not be applied as against certain owner costs that were *fixed* during that period. There is no basis for concluding that the retroactive rental increases allowed by this method would in any systematic way be lower than the increases would have been had HUD from the beginning followed the approach to implementing the "overall limitation" provision allowed by *Ranier View*.

And, again assuming that *Ranier View* correctly interprets the HAP contracts, the prospective portion of section 801 does *not* deprive project owners of any substantive or monetary right established by those contracts. As we have noted, *supra* p. 11, only when modification of the adjustment factors is not a practical or an adequate means to achieve the comparability objective of the "overall limitation" provision does the prospective portion of section 801 take what may be a step beyond *Ranier View*'s interpretation of the contract, by allowing the Secretary, in those limited circumstances, to apply "an alternative methodology." And, such an alternative methodology can be used only "to establish rents that are not materially different from rents charged for comparable unassisted units." *See* section 801(c).

It may be that under *Ranier View*, this ability of HUD, as a last resort, to apply an alternative methodology, when modification of the adjustment factors is not a feasible means to achieve the required market comparability, gives the Department an option not contemplated by the HAP contracts. The *Ranier View* court had no occasion to address that question and apparently assumed that the ability to modify the adjustment factors based on comparability studies would be sufficient in all cases to achieve the government interest stated in the "overall limitation" provision. But in the final analysis the alternative methodology is merely an additional means to achieve the result mandated by the "overall limitation" in section 1.9d of the HAP contracts. Unless respondents have a vested contractual right in the inadequacy of the means stated in the contracts to accomplish the objective also stated in the contracts, respondents could not show that this additional procedure, even if not contemplated by the contracts, deprives them of a rental increase as to which they had a reasonable contract-based expectation.

3. *Due Process Clause Challenges to Statutes Affecting Private Contracts.* The contracts at issue here are between the Government and private parties. The contractual obligations that respondents claim are altered are the Government's obligations. Were it otherwise—were all the parties to the contracts in question private parties—respondents' Due Process Clause claim would be frivolous under this Court's long-settled jurisprudence.

First of all,

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. *See, e.g., Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-488 (1955). [*Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).]

This Court has "further explained that the strong deference accorded legislation in the field of national economic

policy is no less applicable when the legislation is applied retroactively." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). The Court's "cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Turner Elkhorn Mining Co.*, 428 U.S. at 16. And, this Court has stated in the clearest terms the standard to be applied in such cases:

> Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches. . . . [*R.A. Gray & Co.*, 467 U.S. at 729.]

Here, the legislative purposes of remedying maladministration of a regulatory program, avoiding unanticipated windfall profits that result from an error in operation of a government program, and achieving a higher degree of certainty and stability in a regulated market constitute legitimate statutory objectives. And, as we have discussed, *supra* pp. 9-11, the means chosen by Congress are well suited—and are certainly rational means—to accomplish those purposes.

4. *Due Process Clause Challenges to Statutes Affecting Contracts Between the Government and a Private Party.* We hasten to add that the fact that the Government is a party to the contracts at issue here gives this case an added dimension; a dimension we explore now.

a. At the core of the concept of contract is the principle that a party cannot unilaterally diminish its contractual obligations. An unlimited power in the Government to diminish its own contractual obligations on the assertion of a legitimate governmental objective cannot be reconciled with this principle. As Alexander Hamilton put it, "It is in theory impossible to reconcile the idea of a promise which obliges, with a power to make a law which can vary the effect of it." 3 Hamilton's Works

518, 519 (quoted in *Perry* v. *United States*, 294 U.S. 330, 351 n.3 (1935)).

At the same time, at the core of our concept of constitutional government is the principle that the Government must be able to govern. The Legislative Branch cannot be disabled by the Government's contractual obligations from deploying its Article I powers to address the Nation's problems. A Government contract, then, does not constitute a "surrender[] [of] an essential attribute of its sovereignty." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23 (1977).

b. This Court has grappled with the tension created by the coexistence of these two principles most recently in the context of claims under the Contract Clause of Article I of the Constitution, which, of course, by its terms—"No State shall . . . pass any . . . Law impairing the Obligation of Contracts," Art. 1, § 10, Cl. 1—applies only to the States.

United States Trust Co. v. New Jersey, supra, is the seminal modern Contract Clause case involving legislative alteration of a State's contractual obligation. There, two States entered into contracts, in the form of statutory covenants, with the holders of certain bonds, providing that the "revenues and reserves securing the bonds would not be depleted by the Port Authority's operation of deficit-producing passenger railroads beyond the level of 'permitted deficits.'" 431 U.S. at 25. Each State then, by statute, purported to repeal its statutory covenant. Bondholders brought suit against one of the States, claiming that repeal of the covenant violated the Contract Clause.

After assessing the tension between the interest in maintaining the integrity of government contracts and the interest in protecting the ability of a State to carry out its governmental functions, the *United States Trust Co.* Court stated the following standard:

> The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all. [431 U.S. at 25-26 (footnotes omitted).]

Applying that standard, the Court found that the Contract Clause was violated by the State's direct repudiation of the statutory covenant for the purpose of allowing the State to spend the obligated reserves on other governmental objectives.

c. The Framers did *not* include in the Constitution a prohibition on the Federal Government parallel to the prohibition on the States set out in the Contract Clause. And this Court has been wary of reading such a prohibition into the general terms of the Fifth Amendment's Due Process Clause:

> We have never held . . . that the principles embodied in the Fifth Amendment's Due Process Clause are coextensive with prohibitions existing against state impairments of pre-existing contracts. *See, e.g., Philadelphia, B. & W. R. Co. v. Schubert*, 224 U.S. 603 (1912). Indeed, to the extent that recent decisions of the Court have addressed the issue, we have contrasted the limitations imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 17, n.13 (1977). [*R.A. Gray & Co.*, 467 U.S. at 733.]

At the same time, the Court has noted that a "dual standard of review" may apply where legislation affecting contract rights is challenged under the Due Process Clause depending on whether the contract affected is between private parties or between the Government and a private party. *United States Trust Co.*, 431 U.S. at 17 n.25. The Court has not, however, elaborated on the Due Process Clause standard that governs when Congress acts in a way that diminishes a contractual obligation of the Federal Government.

What guidance we have comes from *Lynch v. United States*, 292 U.S. 571 (1934). The *Lynch* Court confronted the following set of facts. Pursuant to an Act of Congress, the Government had issued War Risk Insurance policies, which granted insurance against death or permanent disability in consideration for the payment of prescribed monthly premiums by the insureds. In issuing these policies, no power was reserved by the Government to curtail the benefits that the Government contracted to pay. Subsequently, however, Congress enacted a statute purporting to repeal the act that had authorized the issuance of these policies and thereby to relieve the Government of all liability to pay the promised insurance benefits.

The *Lynch* Court recognized that there are circumstances where the Government, consistent with the requirements of the Due Process Clause, must be able to alter its own contractual obligations: "[T]he due process clause prohibits the United States from annulling [the insurance contracts], unless, indeed, the action taken falls within the federal police power or some other paramount power." 292 U.S. at 579. On the facts of *Lynch*, however, the Court found that the only reason for the Government's annulment of its obligation to pay insurance benefits was the resulting savings the Government

would realize. Accordingly, the Court concluded that Congress' action was not predicated on any such "paramount power":

> Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. [*Id.* at 580.] [6]

d. While all is not clarity, it is at least clear from the case law that the Due Process Clause does *not* impose greater restrictions on the Federal Government than the Contract Clause imposes on the States. And that is enough clarity for the decision of this case. For section 801 would pass muster under the Contract Clause standard stated in *United States Trust Co.*, and therefore,

[6] *See also Perry v. United States*, 294 U.S. 330 (1935). Although *Perry* involves a related factual situation, the case does not appear to have been decided on the basis of the Due Process Clause. In *Perry*, holders of United States bonds " 'payable . . . in gold coin of the present standard of value' " challenged an act of Congress nullifying this promise. The Court phrased the "question" in terms of Congress' "power . . . to invalidate the terms of the obligations which the Government has theretofore issued in the exercise of the power to borrow money on the credit of the United States." *Id.* at 348, 350. The Court answered that question as follows:

> The Constitution gives to the Congress the power to borrow money on the credit of the United States, an unqualified power, a power vital to the Government,—upon which in an extremity its very life may depend. The binding quality of the promise of the United States is of the essence of the credit which is so pledged. Having this power to authorize the issue of definite obligations for the payment of money borrowed, the Congress has not been vested with authority to alter or destroy those obligations. [294 U.S. at 353-54.]

Based on this analysis, the *Perry* Court stated its conclusion on the merits of the case as follows:

> We conclude that the Joint Resolution of June 5, 1933, in so far as it attempted to override the obligation created by the bond in suit, went beyond the congressional power. [294 U.S. at 354.]

most assuredly passes muster under the Due Process Clause.

The threshold Contract Clause requirement is a showing by the claimant that a reasonable contract-based expectation has been impaired. The legislative enactment here—unlike those in *United States Trust Co.*, and in *Lynch*—does not repudiate a contractual obligation of the Government. Indeed, section 801 does not even work a diminution of any reasonable contract-based expectation as to payment from the Government. What section 801 may diminish or eliminate is not a contractual entitlement, but a windfall resulting from an error by HUD in administering the Section 8 program. Thus, the respondents in this case have not even succeeded in opening the door to the constitutional inquiry.

This Court's decision in *El Paso v. Simmons*, 379 U.S. 497 (1965)—a Contract Clause case—is very much in point. There the State had entered into contracts with private parties, which had the "unforseen" and "unintended" effects of conferring "windfall benefits" on speculators, *United States Trust Co.*, 431 U.S. at 31 (describing the facts of *El Paso*), and of imposing "a costly and difficult burden on the State," *El Paso*, 379 U.S. at 515. The State subsequently enacted legislation altering its contractual obligations so as to eliminate those unintended results. The Court applied the following rule:

> Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract. [379 U.S. at 515.]

As we have demonstrated, section 801 is properly viewed as a "[l]aw[] which restrict[s] a party to those gains reasonably to be expected from the contract . . . ." *Id.*

Proceeding with the remainder of the constitutional inquiry serves only to confirm that there is no due proc-

ess violation here. The next step in the inquiry is to look at the reasons for Congress' enactment—as opposed to the effect of the enactment on the owners (which is the focus at the threshold). It is apparent that the legislative purposes here are qualitatively different from those that the Court found inadequate to justify annulment of the contractual obligations in *United States Trust Co.* and in *Lynch*. Here, to the extent that the Legislature sought to save the Government money, it was money that constituted a windfall to project owners over and above what they could reasonably expect from their HAP contracts. Section 801 is not fairly seen as an effort to renege on a Government obligation.

Moreover, the legislative purposes here went beyond the saving the government funds. In the wake of *Ranier View*, and this Court's denial of review in that case, Congress faced instability and uncertainty in the administration of the Section 8 program. HUD disagreed with the *Ranier View* interpretation of the HAP contracts and had a substantial basis for so disagreeing.[7] Neither HUD nor Section 8 project owners across the country could rely with any certainty on the rules governing annual adjustments in government rent subsidies. This uncertainty was compounded by the lack of uniformity in HUD's conduct of comparability studies. *See supra* pp. 8-9. Congress determined that this instability had to be addressed in order to achieve the "smooth and effective operation of the Section 8 program." *See supra* p. 10.

It is true that to the extent the instability was due to the lack of an ultimate judicial resolution of the *Ranier View* issue, Congress could have stayed its hand until the judicial system produced such a result. But the Constitution does not mandate such legislative quietism. And,

[7] *See Carmichaels Arbors Assos. v. United States*, 789 F. Supp. 683 (W.D. Pa. 1992), appeal pending, No. 92-3326 (3d Cir.); *Sheridan Square Partnership v. United States*, 761 F. Supp. 738 (D. Colo. 1991); *National Leased Housing Ass'n v. United States*, 22 Cl. Ct. 649 (1991), appeal pending, No. 92-5064 (Fed. Cir.).

Congress' constitutional options went beyond adopting the *Ranier View* interpretation.

The situation here was one in which the pendency of a legal dispute over the proper interpretation of a standard-form contract to which the Government is a party was interfering with the effectiveness of a government program designed to further important public interests. The Due Process Clause does not prevent Congress from exercising "the federal polic power or some other paramount power," *Lynch*, 292 U.S. at 579, by adopting a well-crafted correction to such a situation, even where that correction may alter what the judicial system ultimately might have found to have been the Government's original contractual obligation. Any such holding would cut far too deeply into the principle recognized in both *Lynch*, 292 U.S. at 579-80, and *United States Trust Co.*, 431 U.S. at 23-25: the Government's contractual obligations may not effect a "surrender[]" of "an essential attribute of its sovereignty." *Cf. Stone v. Mississippi*, 101 U.S. 814, 820 (1880) ("the power of governing is a trust committed by the People to the government, no part of which can be granted away").

CONCLUSION

For the foregoing reasons, and for the reasons stated in the brief for petitioners, the decision of the United States Court of Appeals for the Ninth Circuit in this case should be reversed.

Respectfully submitted,

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